Litigation Under the Shadow of an *Exequatur:* The Spanish Recognition of U.S. Judgments

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In today's world, the recognition and enforcement of foreign judgments is a fundamental part of international litigation. Indeed, much international litigation must now be conducted with a consideration for the laws of the forum country, as well as the legal principles that underlie the recognition of foreign judgments abroad. Due to the wide variations in substantive and procedural law existing between common and civil law countries, this often presents a daunting challenge.

The goal of this article is to analyze the legal issues and practical problems that are associated with the process of obtaining recognition of a U.S. judgment in Spain, or in other words, in obtaining the "*exequatur.*"[1] While this comparison may at first seem discrete, its significance is actually much broader since Spanish law regarding the recognition and enforcement of foreign judgments is fairly representative of many civil law countries. With that said, however, the focus of this article is not the enforcement of U.S. judgments in Spain *per se*, but rather on how to ensure that the judgment of a U.S. court will be eligible for recognition there.

The United States is not a party to any international treaties concerning the recognition and enforcement of foreign judgments, and the much awaited World Convention on International Jurisdiction and Foreign Judgments is still only a work in progress.[2] Further, since the United States and Spain have not signed any bilateral treaties on the subject,[3] the

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1. "*Exequatur*" is a Latin term meaning "let it be enforced." When the Spanish Supreme Court recognizes a foreign judgment by granting *exequatur*, Spain will enforce the judgment as if it were issued by a Spanish court. *See* Orlando A. Gonzales-Arias, *The Enforcement of United States Default Judgments*, 10 HASTINGS INT'L & COMP. L.R. 97, n. 3 (1986).

2. The works of the Hague Conference on the future Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters can be checked online *at* http://www.hcch.net/e/workprog/jdgm.html (last visited Oct. 29, 2004).

3. *See* Gonzales-Arias, *supra* note 1, at 99, n. 14 (naming all countries with whom Spain has signed treaties on the recognition of foreign judgments, and excluding the United States).

exequatur of U.S. judgments in Spain is solely a matter of Spanish domestic law. As such, the *exequatur* of U.S. judgments is regulated by articles 951 through 958 of the old Spanish Code of Civil Procedure of 1881,[4] which were kept in place by the Derogatory Provision 1.3 of the Spanish Code of Civil Procedure of 2000 (LEC)[5] and which apply to the whole Spanish territory.[6] While some of the provisions of the LEC have been recently amended,[7] it should be noted that broader changes may be expected in the future, as the Final Provision number 20 of the LEC anticipates the enactment of an Act on International Judicial Cooperation. As of July 2004, however, this Act is still only a draft that has circulated within the Spanish Ministry of Justice.[8]

The first section explains the basic concepts and introduces the requirements that, as a matter of Spanish law, a U.S. judgment must meet in order to gain recognition in Spain. The second section reviews the main stages of a typical U.S. lawsuit and discusses the contingencies that may affect its recognition in Spain—to wit, there is author commentary on some basic precautions that may be adopted to guarantee that the effectiveness of the U.S. judgment will not be frustrated. The ultimate goal of this article is to give a flavor for how recognition requirements work in practice, and, while the choice of the main topics discussed herein may seem somewhat haphazard, it attempts to touch upon the major and hottest issues that confront lawyers in this area today.[9]

I. The Spanish Exequatur

The Spanish system of recognizing and enforcing foreign judgments consists of a specific procedure, known as the *exequatur*.[10] The *exequatur* is not a review of the merits of a foreign

4. *Ley de Enjuiciamiento Civil* [L.E.CIV. 1881] art. 951-58 (Spain), *available at* http://noticias.juridicas.com/base_datos/Privado/lec.html (last visited Dec. 12, 2004).

5. *Ley de Enjuiciamiento Civil* [L.E.CIV. 2000] (Spain), *available at* http://www.porticolegal.com/textos/27/27_INI_17_20.php (last visited Dec. 12, 2004).

6. Although Spain is divided in separate autonomous communities, as in the United States, Spain has a single court system with the courts divided on the basis of subject matter. *See* Olga Cabrero, *A Guide to the Spanish Legal System*, Law Library Res. Xchange, *at* http://www.llrx.com/features/spain.htm (last visited Oct. 29, 2004).

7. *See, e.g.*, *Ley Organica* [Organic Act] 20/2003 (originally enacted 6/1985 of July 1, 1985) (modifying the judicial power and penal code and eliminating L.E.CIV., art. 958 ¶ 2), *available at* http://www.porticolegal.com/pa_ley.php?ref=966 (last visited Oct. 29, 2004); Act 62/2003 (modifying tax administrative and social measures and L.E.C. iv. art. 955), *available at* http://www.noticias.juridicas.com/base_datos/Admin/162-2003.html (last visited Dec. 12, 2004). Both amendments bear upon the Court that has jurisdiction to hear *exequatur* proceedings.

8. *Anteproyecto de Ley* de Cooperación Jurídica Internacional en Materia Civil [Draft of Act on International Judicial Cooperation], (draft of Dec. 22, 1997), *available at* http://www.mju.es/pl_AntepCoJuriIntCiv.htm (last visited Dec. 12, 2004).

9. For general reviews of Spanish law on the recognition and enforcement of foreign judgments and international litigation in Spain, *see* JOSÉ CARLOS FERNÁNDEZ ROZAS & SIXTO SÁNCHEZ LORENZO, DERECHO INTERNACIONAL PRIVADO (Civitas 2001); ALFONSO-LUÍS CALVO CARAVACA & JAVIER CARRASCOSA GONZÁLEZ, DERECHO INTERNACIONAL PRIVADO, VOL 1. (Comares 2002); M. ÁNGELES SÁNCHEZ JIMÉNEZ, EJECUCIÓN DE SENTENCIAS EXTRANJERAS EN ESPAÑA: CONVENIO DE BRUSELAS DE 1968 Y PROCEDIMIENTO INTERNO (Comares 1998); JOSÉ MARÍA ESPINAR VICENTE, DERECHO PROCESAL CIVIL INTERNACIONAL (Universidad de Alcalá de Henares 1993); FEDERICO GARAU SOBRINO, LOS EFECTOS DE LAS RESOLUCIONES EXTRANJERAS EN ESPAÑA: SISTEMA GENERAL Y CONVENCIONAL (Tecnos 1992).

10. *See, e.g.*, Linda J. Silberman, *Enforcement and Recognition of Foreign Judgments in the United States*, 688 PLI/LIT 451 (2003); or Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147 (2001). There does not seem to be an enormous difference between the recognition of judgments in the United States under the Uniform Foreign

judgment, but is rather an examination of formal and substantive requirements that the foreign judgment must meet in order to become enforceable in Spain.[11] Once the foreign judgment is deemed enforceable, it is treated like any other Spanish executive title through the regular provisions of the Spanish LEC of 2000 (Book III).

Before proceeding to a discussion of the manner in which one should conduct litigation to ensure that a U.S. judgment is enforceable in Spain, it is necessary to introduce briefly the legal requirements that the judgment must meet and the basics of the *exequatur* procedure.

A. Requirements

There are two ways that a U.S. judgment can avail itself of recognition by Spanish law: first, by demonstrating reciprocity, and second by satisfying specific legal requirements.

1. *The Reciprocity System*

As stated, the first way to obtain enforceability of a U.S. judgment in Spain is to establish reciprocity between U.S. and Spanish courts:[12] To enforce a U.S. judgment in Spain on the basis of reciprocity, one must show that U.S. courts recognize a similar Spanish judgment. This is known as positive reciprocity. Alternatively, to defeat the enforcement of a U.S. judgment in Spain on the basis of reciprocity, one must show that U.S. courts do not recognize a similar Spanish judgment. This is known as negative reciprocity. The burden of proof of positive reciprocity falls upon the applicant and that of negative reciprocity on the defendant.

While there are a number of cases in which applicants have tried to use positive reciprocity to obtain the recognition of a U.S. judgment in Spain, the majority of them have been unsuccessful. Indeed, the Decision of the Spanish Supreme Court of February 25, 1985[13] is the only well-known case in which a U.S. judgment was recognized on the basis of reciprocity. This case was peculiar, however, because the Spanish court found legislative, as opposed to judicial, reciprocity on the basis of the Michigan Uniform Foreign Money Judgments Recognition Act.[14] More common is the Decision of the Spanish Supreme Court of April 7, 1998[15], in which an applicant offered two legal opinions to support its contention of reciprocity. While the offered opinions contained citations to well-known cases like *Hilton v. Guyot*,[16] *Nicol v. Tanner*,[17] *Hansen v. American National Bank*,[18] and *Somportex Ltd.*

Money Judgments Recognition Act and in Spain under the LEC. The U.S. and Spanish systems are closer than one would have expected taking into account that the point of reference that manuals and comparativists usually talk about, and which is used by association, is the common law action on the judgment, which could entail a new trial on the merits.

11. *See* STS, June 17, 1991 (R.T.C. No. 132).

12. L.E.C. arts. 952-53, *supra* note 4.

13. See STC, Feb. 25, 1985. The case can be found in Francisco Ramos Méndez, Derecho Procesal Civil Internacional (J.M. Bosch ed. 2001).

14. The main legal issue in the case was whether a U.S. judgment by default would be recognized in Spain—which was not allowed under the provisions of the LEC 1881 but was under the Uniform Act. Furthermore, as discussed later, this decision recognized the Michigan judgment in spite of the fact that it was rendered by default. Note also that, while the applicant had filed for the *exequatur* on the basis of reciprocity, the argument on legislative reciprocity was more an *obiter dictum* than the main ground of the decision.

15. *See* STS, Apr. 7, 1998 (R.J. No. 3559).

16. Hilton v. Guyot, 159 U.S. 113 (1895).

17. Nicol v. Tanner, 256 N.W.2d 796 (Minn. 1976).

18. Hansen v. American National Bank, 396 N.W. 2d 642 (Minn. Ct. App. 1986).

v. Philadelphia Chewing Gum Corp.,[19] the Spanish court held that none of the cases cited therein referred to a Spanish judgment and that, therefore, positive reciprocity had not been established.

Defendants also have tried unsuccessfully to establish negative reciprocity. This was done in an attempt, it seems, to trump the "legal requirements" system that may otherwise render the U.S. judgment enforceable.[20] To my knowledge, however, there are no cases in which a Spanish court has found that negative reciprocity would in fact do so.[21]

In the aggregate, these and similar decisions demonstrate that Spanish courts are very reluctant to recognize either positive or negative reciprocity.[22] This reluctance likely stems from a recognition of the consequences that could follow from such a finding. For instance, a finding of negative reciprocity may condemn Spanish judgments abroad,[23] while a finding of positive reciprocity might bind Spanish courts to accept subsequent foreign judgments. While taking into account the consequences of such findings is important, it cannot be the whole story. For instance, a finding of negative reciprocity may, in fact, be desirable if the foreign court did not recognize Spanish judgments or, alternatively, a finding of positive reciprocity may be advantageous if they did. This juxtaposition illustrates what scholars often fail to appreciate: that national courts need to be strategic in order to elicit the cooperation of foreign courts.[24]

19. Somportex Ltd. v. Philadelphia Chewing Gum Corp 453 F.2d 435 (3rd Cir. 1971).

20. This is because Spanish courts consider whether there is negative reciprocity even in cases in which the applicant seeks recognition under the legal requirements system. *See, e.g.*, STS, May 28, 2002 (J.U.R. No. #159025). In contrast, Spanish scholarship usually considers that a foreign decision could be recognized under the requirements system despite negative reciprocity.

21. There are recent cases in which the Spanish Supreme Court held that negative reciprocity was not established. *See, e.g.*, STS, Nov. 13, 2001 (J.U.R. 2002 No. 608) (holding that the defendant failed to prove negative reciprocity with the United States regarding the recognition of an intellectual property judgment).

22. Courts have explicitly recognized the difficult burden associated with establishing either positive or negative reciprocity. *See, e.g.*, STS, Nov. 18, 2003 (J.U.R. 2004 No. 16645); STS, Jan. 20, 2004 (J.U.R. No. 54318).

23. A negative declaration of reciprocity could also have a chilling effect on the recognition of future requests, since Spanish courts would have a difficult time changing previous findings.

24. For more on the application of the prisoner's dilemma to the recognition and enforcement of foreign judgments, *see* Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416 (1999) (claiming that the current state of recognition doctrine cannot be fully explained through the lens of the iterated prisoner's dilemma); Susan Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115 (2002) (using the prisoner's dilemma to argue in favor of including a reciprocity requirement in the ALI's draft proposal for a Foreign Judgment Recognition Act). Note that the first of these applications of the prisoner's dilemma is positive, like mine, while the second is normative. Whincop claims that the reciprocity requirement's limited role in the recognition of foreign judgments has little to do with the threat of non-cooperation. I do not believe that this interpretation does justice to the prisoner's dilemma analogy. The requirement's relevance is not its existence in legal codes and judicial opinions, but rather its use in the external behavior of courts. To the extent that national courts recognize foreign judgments, as is the case most of the time, their behavior will be deemed to be cooperative even if the reciprocity requirement is not invoked explicitly. On the other hand, Whincop's explanation of the control by the court of the state of recognition of the exercise of jurisdiction by the foreign court clearly is the type of behavior that falls within the scope of the theory.

In her argument that a reciprocity requirement should be included in ALI's Draft of a Foreign Judgment Recognition Act, Stevens analyzes a sequential game of perfect information. First, the U.S. chooses whether to require reciprocity or not, then during the actual recognition stage, U.S. courts and the courts of a foreign country simultaneously decide whether to enforce the other's judgments. Stevens contends that, as in a one-

Beyond this, one may question the usefulness of establishing positive reciprocity with the United States, particularly because U.S. courts generally do not recognize Spanish judgments on a more favorable basis than the Spanish legal requirements system, For instance, a quick look at the Uniform Foreign Money Judgments Recognition Act, which many U.S. states have adopted, reveals that the requirements it establishes are practically identical to those of Spanish law.[25] Therefore, it would be useless to try to establish positive reciprocity in cases that come under this Act. Moreover, Spanish courts have said that the existence of positive reciprocity does not necessarily preclude them from ascertaining whether the foreign judgment meets additional mandatory requirements similar to those of the "legal requirements" system. In this scenario, establishing positive reciprocity would actually make recognition harder since the foreign judgment would have to meet both the requirements that Spanish judgments must meet abroad in addition to the internal requirements.[26] Accordingly, it is not surprising that Spanish courts themselves have told applicants not to try to establish positive reciprocity.

2. *The "Legal Requirements" System*

The second way that a U.S. judgment may obtain enforceability in Spain is through the legal requirements system.[27] Under this system, a U.S. judgment qualifies for recognition in Spain if it meets the legal requirements articulated in the LEC. Unfortunately, however, because the provisions of the old code have been worked and re-worked by legal scholarship and case-law over more than a century, they can be misleading. Indeed, if an outsider tried to obtain the *exequatur* of a foreign judgment exclusively on the basis of the old code's literal translation, he would be surprised, as some requirements are broader than they appear while others are much narrower.

Despite the ambiguities of the old code, it likely provides for the recognition of a U.S. judgment where:[28]

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time prisoner's dilemma model, the choice of reciprocity solves the coordination problem because it provides a mechanism for enforcing promises. The problem, however, is that in a one-shot prisoner's dilemma, non-cooperation is always a dominant strategy, regardless of what the other player does or says. In this case, the foreign court would almost never believe that a U.S. court would enforce its judgment, and would therefore be inclined to refuse reciprocity on principle. The announcement of recognition would not be enough, since such an announcement does not amount to a mechanism to enforce promises. In this game, a trade sanction would serve as such a mechanism, as would the threat of future non-cooperation in an iterated prisoner's dilemma. Therefore, the argument to include a reciprocity requirement in the Draft cannot be that it elicits cooperation from foreign courts, but rather that it allows U.S. courts to act strategically depending on the willingness of foreign courts to cooperate.

25. Uniform Foreign Money Judgments Recognition Act § 4 (2002) (establishing that a judgment will not be recognized if: (1) due process rights were infringed; (2) the foreign court did not have personal jurisdiction; (3) it did not have subject matter jurisdiction; (4) there was no reasonable notice to the defendant; (5) the judgment was obtained by fraud; (6) the cause of action is against public policy; (7) the judgment conflicts with another final judgment; (8) there was a violation of a choice-of-forum clause; or (9) the forum was seriously inconvenient. Spanish law contemplates all these requirements in one way or another.

26. *See* STS, Nov. 18, 2003 (J.U.R. 2004 No. 16645).

27. L.E.Civ. art. 951-58, *supra* note 4.

28. *See, e.g., id.* art. 954; Calvo Caravaca & Carrascosa González, *supra* note 10, at 370-376; Draft Act on International Judicial Cooperation art. 18 (containing similar requirements).

1) it does not concern matters on which Spanish courts have exclusive jurisdiction;
2) it is not the result of a procedure in which the due process rights of the defendant have been violated;[29]
3) it is not against Spanish public policy (or public order);
4) it is not incompatible with a previously rendered or recognized judgment in Spain and no case is pending in Spain which may result in an incompatible judgment; and
5) it is final and authentic.

In addition to these requirements, one should not overlook other potential requirements, such as time limitations, which may be applicable in actions seeking the enforcement of a foreign judgment. In particular, the LEC gives litigants five years to seek enforcement of a judgment regardless of whether the judgment is foreign or domestic.[30] While the Spanish Supreme Court has held that this limitation will not necessarily deny recognition of a judgment, since recognition may be sought for a variety of reasons, it may be an obstacle to the actual enforcement of a judgment upon which recognition is sought.[31] Furthermore, in light of the five-year statute of limitations, enforcement may turn on the date of activation, which, in principle, should be the date that the foreign judgment was rendered, although I have not been able to find any precedent to support this supposition.

The foregoing requirements are controlled *ex officio* by the presiding Spanish judge, with the exception of issues that concern the due process requirement. This latter requirement includes the exercise of personal jurisdiction by U.S. courts, but excludes matters over which Spanish courts have exclusive jurisdiction.[32] What is more, if the defendant in the foreign suit is the applicant for the *exequatur*, the court will not deny the *exequatur* because of the violation of due process rights.

Finally, as the remainder of this paper proceeds to examine how Spanish courts interpret the foregoing requirements, it is important to observe that the ultimate parameter of interpretation, and the point of reference to which foreign litigation is compared, is present Spanish law and, in particular, Spanish procedure. This is demonstrated in the analysis below, as I employ Spanish law in order to assess U.S. institutions. In doing so, however, this comparison should not be read as a mark of parochialism of Spanish courts, but rather as a part of the normal determination of the public policy of the forum, and at other times, an attempt to bring the challenges that international civil procedure raise closer to what is known and safe. While this may be sound in some cases, it may also be completely out of place in others, as international cases have their own needs. But, as one prominent legal scholar has sharply pointed out, while we normally have some intuition on how to resolve substantive legal issues, procedural issues very often escape intuition.[33]

29. The Spanish Constitution and Spanish courts refer to the right to effective judicial protection. See *Constitucion* [C.E.] [Constitution] art. 24. For our purposes, this clause is the Spanish equivalent of the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution. For ease of exposition, I will use the term due process.

30. *See* L.E.Civ. arts. 518, 556 (Spain). Similar statutes of limitations exist in many U.S. states, thereby reducing this problem of enforcement in Spanish courts. Since this is a limitation to enforce, however, presupposing that a judgment has been recognized, I count it as a provision in Spanish law that is applicable here.

31. The Spanish Supreme Court has distinguished time limitations on substantive causes of action from time limitations on the *exequatur*. *See, e.g.*, STS, July 9, 2002 (J.U.R. No. 194563); STS, May 23, 2000 (R.J. No. 4382). The Court has failed to say whether there are any time limitations on *exequatur* itself.

32. CALVO CARAVACA & CARRASCOSA GONZÁLEZ, *supra* note 10, at 370.

33. STEPHEN C. YEAZELL, CIVIL PROCEDURE 2-3 (5th ed. 2000).

B. PROCEDURE

Let us turn now to a brief description of a typical *exequatur* proceeding. In doing so, the underlying analysis addresses first issues of jurisdiction, followed by issues relating to the request, the intervention of the defendant and Public Prosecutor, the Spanish court's decision and finally, the effects of the *exequatur*.

1. *Jurisdiction*

Beyond the fact that Spanish courts have exclusive jurisdiction to hear requests on the recognition and enforcement of foreign judgments in Spain, there are no specific rules concerning the international jurisdiction of Spanish courts.[34] To wit, although some authors claim that the party against whom the *exequatur* is sought must be domiciled in Spain, this is not an actual requirement.

Since January 1, 2004, Spain's system of First Instance Courts (*Juzgados de Primera Instancia*) have had jurisdiction to grant the *exequatur* to foreign judgments and arbitral awards. As there are many First Instance Courts in Spain, the forum court is determined according to:[35]

1) the domicile or place of residence of the party against whom the *exequatur* or the enforcement is sought; or
2) the domicile or place of residence of the party to which the effects of the decision refer; or
3) the place of execution or wherever the decision must deploy its effects.

Prior to January 1, 2004, the Civil Section of the Spanish Supreme Court had, subject to certain International Treaties, exclusive jurisdiction over matters involving the recognition of foreign judgments. The reform was a response to the need to lighten the overwhelming workload of the Spanish Supreme Court.[36] While this may be beneficial in some respects, it is not difficult to see that it may also result in a concomitant decrease in the quality of *exequatur* decisions and increase in the risk of conflicting interpretations of the *exequatur* requirements.[37] Fortunately, there is a consolidated body of case law and legal scholarship, on which the First Instance Courts may draw to temper these two problems. Moreover, this change may speed up *exequatur* decisions, make it easier to obtain provisional measures, and facilitate the enforcement of the foreign judgment since the same Court has jurisdiction to enforce it.[38]

2. *Request*

A litigant may initiate an *exequatur* proceeding by filing a petition with the First Instance Court. This may be done by any persons or entities that were parties to the U.S. judgment,

34. Ley Orgánica del Poder Judicial [L.O.P.J.] art. 22.1 (Spain).

35. L.E.Civ., *supra* note 4 art. 955 (modified by Act 62/2003, *supra* note 7).

36. For example, as of today, the civil section of the Spanish Supreme Court needs an average of six years to render a judgment in Cassation proceedings.

37. *See* Francisco Ramos Méndez, *Arbitraje Internacional*, ANUARIO DE JUSTICIA ALTERNATIVA, num. 5 (2004). The risk is all the more troubling since the Spanish L.E.Civ. does not provide for an appeal of *exequatur* decisions.

38. *Id.* An informal estimation of the duration of *exequatur* proceedings in front of the Spanish Supreme Court suggests that it takes on average of six months to one year. To ascertain the estimated duration of *exequatur* proceedings in front of First Instance Courts, one can use the duration of *exequatur* proceedings under the Brussels Regulation, which is less than six months.

or by any other interested third parties, who also have the option of intervening later, if they show a direct and legitimate interest.[39] In any case, a Spanish lawyer (*Abogado*) and a legal representative (*Procurador*) are necessary.[40]

In addition to a petition, the following documents should be filed with the First Instance Court:

1) an original copy[41] of the foreign judgment[42] either (a) duly legalized or, what is more frequent, (b) certified with the "Apostille" of the Hague Convention of October 5, 1961;[43]
2) an official translation of the judgment into Spanish;[44]
3) proof of the fact that the judgment is final—if the judgment itself does not say so;
4) proof of the fact that the judgment has been served on the opposing party; and
5) a power of attorney, duly legalized or with the "Apostille" if foreign.

One may also present any additional documents that tend to show the propriety of *exequatur*,[45] although, it should be pointed out, that the probative value of these documents is determined by Spanish law. In particular, affidavits, which parties may use to establish that a complaint was served according to the rules of the U.S. court, are probative only as mere indicia of compliance and are assessed together with the other available evidence.[46]

The *exequatur* petition may also be accompanied with a request for provisional measures to secure the effectiveness of the *exequatur* resolution.[47] This request may be filed before the *exequatur* petition or, if need be, later, so long as it is received before the Court that has jurisdiction to hear on the petition.[48] The Spanish LEC is generous and allows courts to issue any measure that can contribute to the effectiveness of the resolution.[49] The applicant, however, must show that: (1) the plaintiff is likely to prevail on the merits; (2) there

39. L.E.Civ. art. 6 (discussing interventions).

40. It is possible to obtain free legal assistance under Act 1/1996, of January 10 on Free Legal Assistance (B.O.E. 1996, 11).

41. A photocopy is not enough. *See* STS, Dec. 9, 2003 (J.U.R. 2004 No. 21879); STS, Nov. 18, 2003 (J.U.R. 2004 No. 16647).

42. Not other documents, even if they contain the judgment. See STS, Nov. 18, 2003 (J.U.R. 2004 No. 16650) (denying an *exequatur* requested on the basis of the summons of the judgment served on the defendant); STS May 27, 2003 (J.U.R. No. 146277) (denying the *exequatur* on the basis of an annotation of the divorce in a U.S. Registry).

43. L.E.Civ. art. 323; Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents (Oct. 5, 1961).

44. L.E.Civ. art. 144.

45. In principle, only documentary evidence is allowed.

46. *See, e.g.*, STS, Jan. 20, 2004 (J.U.R. No. 54318) (discussing U.S. affidavits).

47. L.E.Civ. art. 721 (allowing a party to request provisional injunctions that are necessary to secure the effective judicial protection of a favorable judgment). While this provision refers to a judgment, there should be no qualms to include the *exequatur* resolution. On the other hand, note that the request for provisional measures need not necessarily be filed in front of the same first instance court, although it is advisable to do so.

48. *Id.* art. 723. Before the jurisdiction to hear *exequatur* petitions was attributed to First Instance Courts, the Spanish Supreme Court would refer applicants that sought provisional measures to the First Instance Court of the place where the provisional measure had to be enforced or where it would have effects. *See, e.g.*, STS, May 28, 2002 (R.J. No. 5023). This issue is now moot.

49. *See id.* art. 727 (containing a list of typical measures that can be adopted including attachments, garnishments, preliminary injunctions, preventive annotations in Public Registries, suspensions of corporate resolutions, judicial administrations).

is a risk of a harm derived from the delay in the resolution of the *exequatur*;[50] and (3) a bond that covers the damages that the measure may cause must be posted.[51] The request for provisional measures follows a parallel procedure, which in principle entails a hearing of the defendant, except for good cause.[52]

3. *Interventions*

The Spanish LEC establishes that the party against whom the *exequatur* is sought must be heard.[53] The rules of the Code, with regard to the service of the request, have not been amended to reflect the newly granted jurisdiction in First Instance Courts and still establish that the Court of Appeals is in charge of the summons.[54] Of course, as a practical matter, one has to interpret that the First Instance Court itself is now in charge. The party then has thirty days to appear. The LEC does not require the filing of a written response, although this was the practice in front of the Supreme Court. It is possible that, given the principles of the amended LEC, which encourage oral pleadings, First Instance Courts hold a hearing on the *exequatur.* In any case, the defendant may bring in all the evidence that it deems necessary to make its case though, if she does not appear, the Court will nevertheless proceed. Furthermore, since the Spanish court must verify *ex officio* that the foreign judgment meets the requirements to obtain the *exequatur*, it sometimes happens that the court itself requires the parties to produce further evidence.[55]

The provisions of the Code do not allow for any possibility for the applicant to contradict the other party's evidence, and the Spanish Constitutional Court had said that this is not a violation of the applicant's due process.[56] However, the Spanish Supreme Court had in practice allowed the applicant to have an opportunity to make further pleadings in the light of the grounds of opposition put forward by the defendant. This practice should probably be maintained in front of First Instance Courts. If an oral hearing was held, this exchange of pleadings would be facilitated.

The Public Prosecutor (*Ministerio Fiscal*) is also heard. Its intervention consists of a non-binding opinion as to whether the *exequatur* should be granted or not.

After hearing both parties' pleadings and the Public Prosecutor for nine days, the Court may proceed directly to a decision.

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50. *Compare id.* art. 728 *with* FED. R. CIV. P. 65 *and* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (West 2d ed. 1987). Under the usual U.S. standard, a court will issue a provisional measure if: (1) a plaintiff is likely to prevail on the merits; (2) there is a risk of irreparable harm if the measure is not adopted; (3) the balance of hardships shows that the defendant will not suffer a greater harm than the one avoided; and (4) the measure does not violate public policy.

51. L.E.Civ. art. 728.

52. Whether a provisional measure should be requested in part depends on how long the *exequatur* may take. The adoption of a provisional measure usually takes two months. Thus, if the *exequatur* is likely to last longer, a provisional measure may be advantageous.

53. In the future, art. 22.2 of the Draft Act on International Judicial Cooperation does not require the defendant to be heard prior to the recognition of the foreign decision.

54. L.E.Civ. art. 957.

55. *See* STS, Dec. 9, 2003 (J.U.R. 2004 No. 10294) (suggesting that the Spanish court had doubts as to the what exactly were the effects of the U.S. judgments of divorce and, after asking the parties to produce two opinions of U.S. lawyers which confirmed that the judgment did grant a divorce, the court granted the *exequatur*).

56. STC, Feb. 23, 1989 (R.T.C. No. 54).

4. *Decision*

The Court's decision regarding the *exequatur* will take the form of an interlocutory decision. There are several important aspects regarding this decision. First, the *exequatur* may be total or partial, that is, the Court may grant the *exequatur* with respect to all or only part of the foreign judgment. Second, the Court's decision, regardless of whether it grants the petition or not, cannot be appealed.[57] Although it is theoretically possible to petition the Spanish Constitutional Court to overrule the decision of the First Instance Court on constitutional grounds, the former court has consistently said that it will not review the latter's interpretation of the requirements to grant the *exequatur*, but only review whether the court's decision violated any constitutional right.[58] Third, the English rule applies regarding litigation costs—the losing party pays.[59] Fourth, if the First Instance Court denies the *exequatur*, a new petition may be filed.[60] Finally, if the First Instance Court grants the *exequatur*, the prevailing party may then request enforcement of the foreign judgment in front of the same court if the defendant does not voluntarily comply with it, though the defendant must be notified with respect to each decision.[61]

5. *Effects of the Exequatur*

There may be several effects that accompany the *exequatur*. First, a homologated U.S. judgment is enforceable in the same manner that a Spanish judgment is. In this regard, the prevailing party may use all the executive measures that govern the enforcement of money judgments (Title IV LEC 2000) or non-money judgments (Title V LEC 2000) in Spain. Furthermore, any provisional measures that were taken are automatically transformed into executive measures. Second, a homologated decision may either create or extinguish legal relationships in Spain, for example in the case of a divorce. Third, a homologated judgment can be used in front of Spanish courts to establish that an issue is *res judicata*.[62] This usually has two dimensions: first, a negative dimension in the sense that a homologated decision

57. This is unlike the regime established by the European Council Regulation 44/2001, of December 22, 2001 on jurisdiction and recognition and enforcement of foreign decisions in civil and commercial matters. Council Regulation (EC) 44/2001, 2001 O.J. No. 12) [Brussels Regulation or Regulation 44/2001]. The impossibility of appealing an *exequatur* decision was justified prior to December of 2003 by the fact that the Supreme Court had exclusive jurisdiction to hear the case. The Spanish Constitutional Court had considered that the lack of appeal in *exequatur* proceedings did not constitute a violation of due process rights. *See* STC, Feb. 8, 1984 (R.T.C. No. 74)). Today, concerns may arise as to the wisdom of the lack of appeal, but it is fully in line with the limited possibility to appeal interlocutory decision during the enforcement of domestic judgments which the Spanish LEC consecrates. The system has its drawbacks, as one may be stuck with a hurried decision by an inexperienced First Instance Court, and advantages, as it has often been said that the possibility to appeal the *exequatur* decision under the Brussels Regulation usually unduly postponed the actual enforcement of the judgment. In any case, it is interesting to note that, curiously enough, U.S. judgments are treated more favorably than European judgments in this regard. *See* art. 15 of the Draft of the Act on International Judicial Cooperation (establishing an appeal against *exequatur* decisions so this situation may change in the future).

58. STC, Apr. 15, 1986 (R.T.C. No. 43); STC, Oct. 24, 1984 (R.T.C. No. 98).

59. This is the general rule under the LEC. *See* L.E.Civ. art. 394.

60. This decision does not have preclusive effect. Of course, it seems that there should be a reason to file a new request, for example, if the *exequatur* had been denied due to a lack of authentication of the foreign judgment, the authentication should be obtained first.

61. *See* L.E.Civ. art. 523 (establishing that foreign judgments that are duly homologated may be enforced under the provisions of the same law). One will have to wait twenty days after the decision is served on the defendant before actually being able to request the enforcement of the homologated decision. *See id.* art. 548.

62. STC, Sept. 17, 1986 (R.T.C. No. 703) (admitting implicitly this possibility).

bars suits in Spain on the same matter between the same parties; and second, a positive dimension in that a homologated decision may be used to settle issues that arise in other suits in Spain.

II. U.S. Litigation in the Shadow of the Spanish Exequatur

Now that we have seen the basic steps of the *exequatur* proceedings in Spain, and briefly talked about the general legal requirements that a U.S. judgment must meet in order to be recognized, it is time now to go into what I think may be useful when preparing or conducting a U.S. suit that may have to be enforced in Spain.

A. Previous Spanish Judgments and Cases Pending in Spanish Courts

When conducting litigation in the United States that may require subsequent enforcement in Spain, an attorney should always consider that the resulting judgment will not be recognized in Spain if it is incompatible with a previously rendered or recognized Spanish judgment or if a case is pending in Spain which may result in an incompatible judgment. While it is not difficult to ascertain whether a potentially disqualifying judgment exists in Spain, there are a number of problems that this may nevertheless create in the context of the *exequatur*. To begin with, a Spanish complaint will not be stayed due to the pendency of litigation in the United States (international *lis pendens*). This is because Spanish courts are reluctant to accept the propriety of foreign litigation in the absence of a treaty.[63] Furthermore, as we will see, U.S. anti-suit injunctions are not recognized in Spain, and the availability of anti-suit injunctions under Spanish law is uncertain. In light of this, any interested party could potentially forestall the *exequatur* proceedings merely by filing a complaint in Spain on the same issue. This problem is aggravated by the fact that the concept of "incompatibility" is much broader than the legal doctrines of *lis pendens* or *res judicata*—as the concept of incompatibility encompasses any type of logical incompatibility between the two judgments and does not necessarily require identity of parties, object or cause of action.[64] For example, a foreign divorce decree will not be recognized if there is a pending Spanish judgment on separation.[65]

To reduce the possibility that a litigant will succeed in stalling the *exequatur* proceedings by filing a fraudulent complaint, Spanish courts have carved out exceptions to the general rule on the basis of article 11.2 LOPJ, and carefully scrutinize whether there may in fact be fraud.[66] To accomplish the latter, the Spanish courts take into consideration: (1) if an action in Spain is registered before the suit in the U.S., as this reduces the possibility that the Spanish case was improperly initiated and accordingly increases the possibility that the

63. *See, e.g.*, Judgments of the Court of Appeals of Barcelona of Sept. 18, 2000 (JUR 2001/83); L.E.C. iv., (JUR 2000/142); *accord* Francisco Málaga Diéguez, La Litispendencia 370-407, 406-407 (J.M. Bosch ed. 1999). Note that this is also the approach of U.S. courts under *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877 (3rd Cir. 1981). *See also* Gary B. Born & David Westin, International Civil Litigation in United States Courts, Commentary and Materials 320-21 (2d ed. 1992).

64. *See* STS, June 20, 2000 (R.J. No. 4656).

65. STS, July 8, 2003 (J.U.R. No. 206114) (denying recognition of a 1997 divorce because of a 1998 Spanish judgment on separation); *see also* STS, Oct. 29, 2002 (J.U.R. No. 266327).

66. This provision states that Spanish courts may reject, for a reason, requests, incidents and exceptions put forward by the parties that are abusive or fraudulent.

exequatur will be denied, even if the U.S. case finishes first;[67] and (2) if the U.S. action is served on the defendant before an action is registered with a Spanish court. In the latter case, things are more complicated. Recent cases seemingly establish a presumption of fraud and the *exequatur* may be granted if the Spanish case is still pending.[68] The prevailing party may then use the homologated decision to stay the Spanish proceeding. This line of cases should be welcome, in the light of all of the problems that are with this requirement in practice. However, a delay in requesting the enforcement of the U.S. judgment, may weaken the presumption of fraud.[69]

Courts have not said what happens if the Spanish case starts after a complaint is filed in the United States and ends before a judgment is obtained in the U.S. case. On the basis of the general rule, it seems that the *exequatur* would not issue. Whether this situation can actually arise depends of course on the expected duration of the Spanish and U.S. cases. The average duration of a civil case in Spain is between six months and a year.[70] In U.S. federal courts, the statistics seem to be around the same.[71] Therefore, if both cases are filed simultaneously, a race begins in which there is a 50 percent chance of the U.S. action becoming unenforceable in Spain.

B. Jurisdiction

The second aspect to consider, with respect to a U.S. judgment that relies on Spanish enforcement, is whether the presiding court in the United States has jurisdiction over the matter. During the *exequatur* proceeding, the presiding Spanish court reviews the exercise of jurisdiction by the U.S. court on at least two counts: first, regarding whether the issue belongs to the exclusive jurisdiction of Spanish courts; and second, regarding whether the due process rights of the defendant have been infringed. While these two issues do not fall neatly into the classical distinction between subject-matter and personal jurisdiction, this division will be used for ease of exposition. Forum selection clauses and arbitration clauses are also analyzed.

Note three things regarding issues of jurisdiction. In principle, only the international jurisdiction of U.S. courts, and not matters of venue, will be subject to review. Second, the findings of U.S. courts as to their exercise of jurisdiction are not *res judicata* and may be reviewed by Spanish courts in *exequatur* proceedings.[72] Third, it is not likely that a Spanish

67. STS, June 20, 2000 (R.J. No. 4656).

68. *See* STS, Mar. 20, 2001 (R.J. No. 5520); STS, Oct. 14, 2003 (J.U.R. No. 261270); *but see* STS, Jan. 19, 1999 (R.J. 186) (illustrating that, before 2001, the *exequatur* would have denied in these cases).

69. *See* STS, Apr. 28, 1998 (R.J. 3595). This case is peculiar due to the fact that the court held that the *exequatur* petition itself was a fraud. The applicant obtained a foreign judgment in 1992 but did nothing else. In 1997, the defendant filed a suit in Spain and immediately thereafter, the applicant filed its petition of recognition. Due to this, the court presumed that the behavior of the applicant was fraudulent.

70. Santos Pastor Prieto, *Dilación, eficiencia y costes, ¿Cómo ayudar a que la imagen de la Justicia se corresponda mejor con la realidad?*, Fundación BBVA Documento de Trabajo (2003) (showing that, in 2001-2002, a civil case in front of a first instance court takes an average of eight months in Barcelona and eleven months in Madrid).

71. A search on contracts, property and tort cases in federal district courts reveals an average duration of 9.6 months in 2000. *See* Judicial Statistics Inquiry Page, *available at* http://teddy.law.cornell.edu:8090/questata.htm.

72. This is true because *exequatur* proceedings determine whether a foreign judgment will be given preclusive effect in Spain.

court will overturn the findings of a U.S. court regarding the latter court's holding on jurisdiction; that is, an *exequatur* is seldom refused on the basis of jurisdictional issues.

1. *Subject Matter Jurisdiction*

Subject matter jurisdiction may be a cause of concern due to the fact that there are particular issues that are reserved to the exclusive jurisdiction of Spanish courts. While article 954.1 of the LEC requires that the *exequatur* be based on an action *in personam*, Spanish courts interpret this provision to exclude only issues that fall within their exclusive jurisdiction. As a result, before filing a suit in the United States, one should check that the action does not fall into one of the following categories, lest the *exequatur* be denied:[73]

1) actions *in rem* and leases regarding immovable property located in Spain;
2) the validity and dissolution of corporations and other juridical entities whose seat is located within Spain, and their decisions and agreements in that regard;
3) the validity of annotations in Spanish public registries;
4) the registration and validity of patents, trademarks, designs, models and other similar rights, which are registered, or which are in the course of being registered, in Spain; and
5) the recognition and enforcement of foreign judicial and arbitral decisions in Spain.

The second exception was discussed recently in the Decision of the Spanish Supreme Court of January 20, 2004.[74] In this case, an insurance company sued both a Spanish company and its director to recover damages that the insurance company had paid to persons harmed in the United States by the Spanish company's product. The U.S. court found for the plaintiff. At the time of the *exequatur*, however, the defendant claimed that Spanish courts had exclusive jurisdiction because the liability of corporate directors fell within the scope of the second exception. Despite the defendant's arguments, however, the Spanish Supreme Court held that the liability of directors was not included in that exception.

The fourth exception has similarly been analyzed by the Spanish Supreme Court in its decision of September 18, 2001.[75] In this action for *exequatur*, the petitioner sought recognition of a U.S. judgment for damages and an injunction ordering the defendant to abstain from using a trademark derived from a know-how, trademark use and distribution agreement. While the defendant claimed that the *exequatur* should be denied because the case should have been heard by Spanish courts, the Spanish Supreme Court issued the *exequatur* because it found that the action clearly derived from a contract and noted that the validity of the trademark, which was registered in Spanish registries, had never been discussed.

In general, it is rather unlikely that a U.S. court would consider that it has jurisdiction to adjudicate in those cases, at least directly. Of course, those issues could also be raised incidentally in other types of actions. In principle, a U.S. court could decide on those incidentally without thereby impairing the possibility of obtaining the *exequatur*.

2. *Personal Jurisdiction*

Spanish courts also review whether the exercise of personal jurisdiction by U.S. courts violates a litigant's due process rights. In determining whether personal jurisdiction is

73. L.E.Civ. art. 22 ; L.O.P.J. art. 22.1.
74. *See* STS, Jan. 20, 2004 (J.U.R. No. 54318).
75. *See* STS, Sept. 18, 2001 (J.U.R. No. 264071).

proper, Spanish courts adopt an approach that is similar to that taken by the U.S. Supreme Court in *International Shoe Co. v. Washington.* That approach examines personal jurisdiction on the basis of the two-pronged test: (1) minimum contacts; and (2) fair play and substantial justice.[76]

Since 1985, the Spanish Supreme Court has recurrently said that a court's exercise of personal jurisdiction does not violate a defendant's due process rights, in the context of an proceeding to obtain the *exequatur*, if the suit has "reasonable contacts" with the forum and the forum had not be chosen for fraudulent reasons.[77] In other words, a Spanish court will consider a foreign court's exercise of jurisdiction proper if the Spanish court would have exercised jurisdiction in the same situation. This approach was validated by the Judgment of the Constitutional Court of April 15, 1986.[78] In this case, the Spanish court held that the U.S. court had properly exercised jurisdiction over the defendant in a tort liability case because the defendant had exported its goods to the U.S. and had accordingly established a "point of contact" with the United States. It should be noted, however, that this rationale only provides a basis for the exercise of specific, as opposed to general, jurisdiction. Note also that it is likely that the whole U.S. territory will be used to establish whether there are "reasonable contacts."[79]

The type of situations in which Spanish courts will deem that personal jurisdiction over a defendant violates his right to due process include the typical examples of what are called *exorbitant fora*, such as jurisdiction based on the nationality of the plaintiff, jurisdiction based on the mere service of process, and jurisdiction based on assets of the defendant within the jurisdiction when those assets are not the object of the controversy.[80] It is not similarly clear however whether U.S. courts will also find these fora to be improper in establishing jurisdiction. For instance, jurisdiction based on the nationality of a plaintiff appears to fail the "minimum contacts" test under *International Shoe.* In addition, *Shaffer v. Heitner* refused to exercise general jurisdiction over a defendant where the defendant's only contacts with the forum was property within the forum.[81] And cases like *World-Wide Volkswagen Corp. v. Woodson* and *Helicópteros Nacionales de Colombia S.A. v. Hall* have placed additional limitations on the exercise of personal jurisdiction based on "doing business" which sound much like what Spanish courts would accept.[82] Alternatively, while tag jurisdiction, jurisdiction based on service of process within a jurisdiction, seems to be authorized under *Burnham v. Superior Court of California*, it would not be accepted by Spanish courts.[83]

76. International Shoe Co. v. Washington. 326 U.S. 310, 316 (1945).

77. *See* STS, Feb. 6, 1985 (No. N/A); STS, Feb. 25, 1985 (No. N/A). Both can be found in RAMOS MÉNDEZ, *supra* note 14.

78. STC, Apr. 15, 1986 (R.T.C. No. 43); *See also* Francisco Ramos Méndez, *Adiós a la Rebeldía Táctica*, JUSTICIA no. 1, at 103 (1987).

79. *See, e.g.*, STS, May 28, 2002 (J.U.R. No. 159025) (involving a U.S. judgment of divorce); STS, July 31, 2003 (J.U.R. No. 206271) (concerning a Mexican divorce judgment).

80. *See* CALVO CARAVACA & CARRASCOSA GONZÁLEZ, *supra* note 9, at 97.

81. Shaffer v. Heitner, 433 U.S. 186, 217 (1977).

82. *World-Wide Volkswagen Corp.*, 444 U.S. at 302; Helicópteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). The only real issue with this criterion, from the point of view of a world convention on jurisdiction, is whether it allows for the establishment of general jurisdiction. *See also* JOAQUIM-J. FORNER DELAYGUA, HACIA UN CONVENIO MUNDIAL DE "EXEQUATUR," ALGUNOS ASPECTOS DEL DERECHO ESTADOUNIDENSE DE INTERÉS PARA ESPAÑA 256-69 (Librería Bosch 1999).

83. Burnham v. Superior Court of California, 495 U.S. 604 (1990).

It might also be useful to give examples of what Spanish courts might believe to be sufficient contacts with the United States. In the divorce context, Spanish courts consider aspects such as whether at least one of the parties is a U.S. citizen, whether the domicile of at least one the parties is in the United States at the time of the complaint, the explicit acceptance of the jurisdiction of U.S. courts by the foreign defendant, and whether the marriage took place in the United States.[84] In the insurance context, a Spanish court held that there were sufficient contacts with the United States because one of the parties to the contract was a U.S. citizen, the case referred to an exclusive distribution agreement in the United States, and the harm had occurred within the United States[85] In a know-how, trademark use and distribution agreement, the court found that a forum selection clause pointing to the United States, and the domicile in the United States of one of the parties to the agreement were enough.[86] In an action on patent infringement, the Spanish court considered that the fact that one of the parties was a U.S. national domiciled within the United States, the violation of patent rights had occurred within the United States and that the majority of the decision's effects would be felt in the United States, were sufficient contacts for U.S. courts to exercise jurisdiction over the defendant.[87]

3. *Forum Selection and Arbitration Clauses*

Forum selection clauses and arbitration clauses are also pertinent to the *exequatur.* There are four cases to consider: (1) if the forum selection clause points to a U.S. court and the clause is valid under U.S. and Spanish law, the *exequatur* will be granted; (2) if the forum selection clause points to a U.S. court, is valid under U.S. law, but invalid under Spanish law, the *exequatur* will be denied; (3) if the forum selection clause points to a non-U.S. court or it is rather an arbitration clause which is invalid under U.S. law but valid under Spanish law, the *exequatur* will be denied; and (4) if the forum selection clause points to a non-U.S. court or it is an arbitration clause, which is invalid both under U.S. and Spanish law: the *exequatur* will be issued. Therefore, to the extent that Spanish and U.S. law differ on the validity of forum selection and arbitration clauses, recognition may be problematic. That said, it is hard to find a Spanish case that denies the *exequatur* for matters related to forum selection or arbitration clauses, or even a case that entertains those issues.

In principle, Spanish law acknowledges forum selection clauses with few formal or material requirements. This suggests that Spanish courts will not hesitate to grant the *exequatur* if the clause points to a U.S. court.[88] Nevertheless, three types of forum selection clauses may violate the Spanish public policy. First, forum selection clauses that involve matters over which Spanish courts have exclusive jurisdiction are deemed invalid for the purposes of an *exequatur* proceeding. Second, forum selection clauses must concern issues within the sphere of private autonomy. For instance, a forum selection clause would be valid if it concerned the patrimonial consequences of a separation or divorce, but invalid if it concerned family relations or legal capacity. Third, forum selection clauses in consumer con-

84. *See, e.g.*, STS, Oct. 13, 1998 (R.J. No. 7672); STS, Dec. 9, 2003 (J.U.R. 2004 No. 10294); STS, Sept. 16, 2003 (J.U.R. No. 215021).

85. STS, Jan. 20, 2004 (J.U.R. No. 54318).

86. *See* STS, Sept. 18, 2001 (J.U.R. No. 264071).

87. *See* STS, Nov. 13, 2001 (J.U.R. 2002 No. 608).

88. L.O.P.J. art. 22.2; *see also* STS, Sept. 18, 2001 (J.U.R. No. 264071) (noting the existence of a forum selection clause during its analysis of whether the case had reasonable contacts with the United States).

tracts may be held invalid pursuant to consumer protection legislation. In particular, a forum selection clause in which the parties submit any disputes to a Court different from that of the domicile of the consumer, the place of execution of the obligation, or the place where the immovable property is located, is deemed to be abusive.[89]

From the point of view of U.S. law, two problems arise. First, the leading U.S. case on forum selection clauses in international transactions, *Bremen et al. v. Zapata Off-Shore Company*, openly endorses the policy that forum selection clauses should be enforced, while at the same time introduces the possibility to relax this policy if the enforcement of the clause would be clearly unreasonable or unjust.[90] This is a very broad standard which makes it possible for a U.S. court to fail to enforce a clause that points to another jurisdiction for reasons beyond what Spanish law allows, thereby possibly rendering the U.S. judgment unenforceable in Spain. Second, many U.S. state statutes introduce further requirements to validate forum selection clauses, which makes such laws more restrictive than Spanish law.[91] Again, in this situation, if a U.S. court failed to enforce such clauses, denial of the *exequatur* may ensue.

Arbitration clauses are allowed under Spanish law if they: (1) make explicit the will of the parties to submit all or some present or future controversies to arbitration; and (2) are in writing, regardless of whether they are an independent agreement or a clause in a contract. If it is an international commercial arbitration, however, the validity of an arbitration clause is assessed under the law chosen by the parties to govern the arbitration agreement of the underlying controversy or under Spanish law.[92] Arbitration must concern issues over which parties can dispose privately. Nevertheless, special rules apply to arbitration clauses in consumer contracts. For example, they will be considered abusive if they designate a type of arbitration different from consumer arbitration.[93] Courts have shown their willingness to control those clauses as violations of Spanish public policy in *exequatur* proceedings.[94]

U.S. courts enforce arbitration clauses, both in domestic and international controversies, when the parties make their will to recur to arbitration clear and explicit. Also, when it comes to issues of arbitrability, U.S. courts are more liberal than Spanish courts. For example, cases like *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, while held that the asserted antitrust claims were arbitrable, are not likely to be decided in the same way in Spain.[95] Alternatively, if U.S. courts are more likely to refer litigants to arbitration, problems in *exequatur* proceedings of U.S. judgments will be less likely. Furthermore, with regard to arbitration clauses that are contained in consumer contracts with international aspects, the U.S. Supreme Court's holding in *Carnival Cruise Lines, Inc. v. Shute* was favorable to such clauses unless they were unfair.[96] This is a broader standard of review than what Spanish law allows and there is a risk of contradictory considerations regarding those clauses.[97]

89. Gen. Consumer and User Protection Act 26/1984 (July 19, 1984), First Additional Disposition V.27 (B.O.E. 1984, 176) (as modified by Gen. Conditions for Contracting Act 7/1998 (Apr. 13, 1998) (B.O.E. 1998, 89)).

90. Bremen et al. v. Zapata Off-Shore Company, 407 U.S. 1 (1972).

91. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 281-82 (West 1993).

92. *See* Arbitration Act art. 9 (B.O.E. 2003, 309).

93. *See* Gen. Consumer and User Protection Act 26.1984, First Additional Disposition V. 26, as modified by Gen. Conditions for Contracting Act 7/1998.

94. STS, Feb. 8, 2000 (R.J. No. 766); STS, Nov. 28, 2000 (R.J. No. 703).

95. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

96. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

97. American commentators note that, given the facts of *Carnival Cruise Lines*, a clause in small print on a passenger ticket might not meet the standard. *See* LOWENFELD, *supra* note 92 at 327.

C. Service of Process

As service of process is part of a defendant's due process rights under the Spanish Constitution, Spanish courts examine whether the complaint has been duly served when determining whether recognition of a foreign judgment is proper. In this regard, the Court deciding on the issue of recognition examines whether a defendant had a reasonable opportunity to know about the existence of the original complaint and a reasonable time to prepare its case.[98] This, of course, begs the question whether the main options to notify a complaint filed in the U.S. generate any problems under this test.

U.S. procedure usually allows for private service of a complaint if the defendant waives his right to be served by summons. This procedure contrasts sharply with Spanish procedure, which requires that summons be served by the presiding Court.[99] Nevertheless, under the standard set, this type of service should be sufficient, and the waiver of service should prove that the complaint was effectively served. This holds both for defendants within and without the U.S. territory.

Service by summons within the United States, as a regular form of service, should not create any problem either since, as stated, this is the typical form of service in Spain. A complication may arise, however, if the defendant is a foreign corporation that merely has an open branch, office or agents within the United States. In principle, service to these individuals and entities is acceptable so long as the claim refers to activities that arise out of, or relate to, activities occurring within the United States.[100] Service on subsidiaries regarding a foreign principal may be more problematic.[101] But, of course, this presupposes that U.S. courts have jurisdiction over the defendant, which is examined independently of service.

If the defendant is not within the United States but rather is in Spain, service of process should be made according to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents of November 15, 1965, to which both the United States and Spain are signatories.[102] Moreover, Spanish courts have even found service of process to be valid in cases in which service was not performed in accordance with the provisions of the Hague Convention, in spite of the fact that it was applicable, as long as it met the due process test spelled out above.[103]

Some jurisdictions within the United States provide for service of a complaint by publication when the defendant cannot be found. While this type of service is also allowed under Spanish law, after personal service has been attempted and a reasonable effort to locate the defendant has been made,[104] the *exequatur* may nevertheless be denied in cases

98. STC, Apr. 15, 1986 (R.T.C. No. 43); STS, Nov. 13, 2001 (R.J. No. 608).

99. L.E.Civ. arts. 155, 404.

100. *Id.* art. 51.

101. See STS, Mar. 4, 2003 (J.U.R. No. 87951) (denying the *exequatur* under the Convention between Spain and Czechoslovakia in a case in which the notification was made on a subsidiary of a Spanish company in Czechoslovakia); *contra Volskwagen Aktiengesellschaft v. Herwig Schlunk*, 108 U.S. 2104 (1988) (holding that service on an American subsidiary was sufficient although the foreign principal claimed that the Hague Convention was applicable and required service of process in the defendant's home domicile).

102. *See* Fed. R. Civ. P. 4.(f). The Convention is a common standard and its application should ensure recognition of the U.S. judgment. *See, e.g.*, STS, Apr. 7, 1998 (R.J. No. 3559) (noting a situation in which the Spanish Central Authority was used by a U.S. court).

103. *See, e.g.*, STS, Nov. 13, 2001 (J.U.R. 2002 No. 608).

104. L.E.Civ. art. 164.

in which the foreign court directly served the complaint by publication.[105] As a result, while this type of service will not necessarily result in the denial of the *exequatur*, it should only be used under exceptional circumstances that can be demonstrated with extrinsic evidence.

D. Limited Appearances and Failures to Appear

Limited appearances, without more, are not sufficient to establish jurisdiction in U.S. courts. However, if a properly served defendant does not file an answer on the merits, U.S. courts will pursue the case and pass judgment by default. In *exequatur* proceedings, Spanish courts will also treat those as judgments by default but the defendant will still be able to raise issues related to the U.S. court's exercise of personal jurisdiction over him.[106] A similar treatment will be given to an appearance that first contests the jurisdiction of the court and answers the complaint on the merits.

When judgment is rendered in absentia, the question arises whether the judgment will be enforceable. In this regard, Spanish courts may examine whether the defendant was duly served with process, as the Spanish Constitutional Court has said that there is no violation of due process requirements if the party against whom the *exequatur* is sought was duly served with process but nevertheless refused to appear.[107] In the leading case on this issue, a defendant failed to appear because it was unduly burdensome to appear in front of the foreign court and the foreign court may not have been a fair and impartial forum. The Spanish court nevertheless held that the defendant's right to due process had not been violated because the defendant had been duly served. This decision is all the more important since a literal reading of art. 954.2 of the LEC suggests that judgments by default serve as absolute bars to recognition. After this decision, judgments by default will not gain recognition if: (1) the plaintiff fails to show that the defendant knew about the complaint; or (2) the defendant shows that failure to appear was due to "force majeure." We will see later, however, that judgments by default raise other due process and public order issues. But for now, it is sufficient to note that, if service was properly affected, default in itself will not result in the denial of the *exequatur*.

E. Provisional Measures and Anti-suit Injunctions

Provisional measures, which are available in courts in the United States, often determine whether or not a suit should be initiated. Similarly, since the existence of another suit on the same issues in Spain may be a reason to deny the *exequatur*, anti-suit injunctions may be critical. It is therefore important to know whether a decision on provisional measures or anti-suit injunctions would be enforceable in Spain. In principle, it would not, although there may be an alternative.

105. *See, e.g.*, STS, Feb. 8, 2000 (R.J. No. 764) (quoting the STC, Mar. 8, 1999 (R.T.C. No. 26) and STS, Oct. 23, 2001 (J.U.R. No. 296501)).

106. *See* STS, Apr. 7, 1998 (R.J. No. 3559).

107. STC, Apr. 15, 1986 (R.T.C. No. 43) (touching on a U.S. judgment grounded in tort). The Decision of the Spanish Supreme Court of February 25, 1985 in Ramos Méndez, *supra* note 21, had already recognized the U.S. judgment. The judgments distinguished between failures to appear for strategic reasons and failures to appear on the true belief that the foreign court did not have jurisdiction. Their holding seemed to bear upon the first case only. One may therefore think that the latter case supports the denial of *exequatur*. *Accord*, STS, Feb. 17, 1998 (R.J. No. 2674); STS, May 26, 1998 (R.J. No. 5345) (holding that only failures to appear for strategic reasons are not a ground to deny the *exequatur*).

The standard for provisional measures consecrated in the LEC used by Spanish courts is not unlike the standard used in the United States. In fact, the U.S. standard may be even higher since it requires a risk of an irreparable harm, while the Spanish standard merely requires the risk a harm, regardless of whether it is reparable or not. U.S. and Spanish law also require that the applicant post a bond.[108] Therefore, the standard used would not constitute a reason to deny a provisional measure.

The procedure to adopt provisional measures does not turn out to be a problem, either. In particular, the fact that some U.S. provisional measures may be adopted without a hearing of the adverse party may not constitute a problem since Spanish law also dispenses of a hearing in cases in which it might impair the effectiveness of the measure.[109] Neither public policy, nor due process rights would be infringed. However, as of today, according to the opinion of most legal scholars, U.S. orders on provisional measures would not obtain the *exequatur* because they do not constitute final decisions.[110] Indeed, much like Spanish law, provisional measures may be revoked or modified when the circumstances in which they were adopted change or after the final judgment on the merits is passed.[111] This accordingly makes provisional measures unsuitable for the type of permanent effect that the *exequatur* purports to attribute to foreign decisions. For the same reason, Spanish courts would not issue the *exequatur* to anti-suit injunctions, which are a form of a provisional measure.

This situation could change in the near future since article 14 of the Draft Act on International Judicial Cooperation says that foreign decisions on provisional measures shall be recognized and enforceable in Spain as long as they are allowed under Spanish law. In fact, a recent decision of the Spanish Supreme Court dealt with a petition for the recognition of a provisional measure without raising any issue in that regard.[112] In this case, the Court refused to recognize the provisional measure, holding that the defendant had not been duly served and that the provisional measure had been rendered by default.

The conceptual problem that stems from the fact that the decision on the measure is not final, and thus not suitable to gain *exequatur*, can be overcome if one considers that changes regarding the measure are embodied in new decisions of the foreign court, which may gain recognition in their turn. It is accordingly not that the initial decision is not final, but rather that further decisions may modify the situation that it regulates, and become final in their turn. Many problems associated with modifiable provisional measures may be eliminated in the near future as the assignment of jurisdiction to First Instance Courts makes it more likely that foreign modifications can be quickly and efficiently implemented in Spain.

Going beyond the issues that the recognition of provisional measures raise, one may be able to obtain a provisional measure directly in front of a Spanish court on the basis of the action filed in the United States. There are three requirements to do so. First, the provisional measure must affect assets or persons within the Spanish territory. Second, the action in the United States must be pending. Finally, Spanish courts cannot have exclusive juris-

108. *See* FED. R. CIV. P. 65(c); L.E.C. iv., act. 728.3.

109. L.E.CIV. art. 733.2. Note, however, that even within the context of the European Union, Regulation 44/2001 establishes that provisional measures granted without a hearing in one State cannot be recognized in another State.

110. *See* L.E.CIV. art. 751; CALVO CARAVACA & CARRASCOSA GONZÁLEZ, *supra* note 10, at 386-387.

111. *See, e.g.*, FED. R. CIV. P. 62(c) (allowing courts to suspend, modify, restore or grant a preliminary injunction when an appeal is granted).

112. *See* STS, Sept. 16, 2003 (J.U.R. No. 214989).

diction to hear that action.[113] This possibility is especially attractive given the fact that the Spanish standard for provisional measures is lighter than the standard in the United States—to wit, as a general rule, they can be obtained at any stage of the U.S. proceedings.

In light of the foregoing discussion of provisional measures, it is important to note that anti-suit injunctions may be treated differently with respect to the *exequatur* or, more generally, as a measure of relief in Spanish courts. At most, the issue of whether an anti-suit injunction can gain recognition or be issued by a Spanish court is unclear, but as a practical advice, courts are not likely to accept them as I have been unable to find a Spanish decision that either issued or denied an anti-suit injunction. A recent example of the conflict between the common law and the civil law traditions on this matter can be found in the decision of the European Court of Justice in *Turner v. Grovit.*[114] In Turner, the Court held that the Brussels Regulation precludes the grant of a foreign state's anti-suit injunction. One of the main arguments asserted in Turner concerned the availability of other mechanisms within the Brussels territory to deal with those issues—namely, the rules on *lis alibi pendens* and related actions. Of course, in cases between the United States and Spain, and many other international cases, there are no such mechanisms and anti-suit injunctions may be the only available solution.

In principle, under Spanish law, one may obtain a provisional measure as long as its effects derive from and contribute to, the effectiveness of the main action. In my opinion, however, I believe that Spanish courts are more likely to find either that the prospects of a future decision are too remote to say that the applicant is likely to prevail on the merits or that the adoption of a provisional measure would violate the right of access to justice that is contained in article 24 of the Spanish Constitution. The latter conclusion may be too quick, though as an anti-suit injunction could conceivably be framed in several ways—that is, as a prohibition on the defendant to file a suit in Spain; as a prohibition on other Spanish courts to entertain a given action; or as an obligation on a Spanish court to temporally stay any proceedings. While the first two options effectively prevent access to justice and may constitute a violation of article 24 of the Spanish Constitution, the third probably does not. As a drawback, however, the third option requires that a court issue an order addressed to another Spanish court, and Spanish judges may not like this approach. In any case, the chances of anti-suit injunctions are slim.

F. Further Pleadings, Claims and Provisional Measures Revisited

U.S. rules of procedure allow for changes to initial pleadings, the addition of further pleadings not originally included in the complaint, the inclusion of further claims, the intervention of other parties and the adoption of provisional measures. The question thus arises as to whether these impede the *exequatur.*

With regard to pleadings, cross-claims, interventions,[115] and interpleader, the answer is no, so long as all pleadings are served on the defendant and the defendant has the possibility

113. *See* L.O.P.J. art. 22.5; L.E.C. iv., art. 722.

114. Case 159/02, Turner v. Grovit, 1 W.L.R. 107 (2004); *see also* Marta Requejo Isidro, *Medidas Antiproceso: Turner v. Grovit, Final Discutible de un Debate,* La Ley num. 6051 (June 2004).

115. In STS, Dec. 24, 1996 (R.J. No. 8394) the plaintiff filed a tort claim against an injurer or an insurance company and the plaintiff's company voluntarily intervened in the suit to recover medical expenses and compensations that it had paid on behalf of the plaintiff. The U.S. court granted the intervening party the damages sought and the Spanish court subsequently recognized them.

to defend his position. As much as an irregular or ineffective service of the original complaint may constitute a violation of due process requirements, the lack of service of amended or supplemental pleadings also infringe that same right. In fact, Spanish rules require these pleadings to be notified. This requirement on amended or supplemental pleadings, however, should not constitute a problem since the solution in the United States is the same.[116]

Provisional measures adopted in a U.S. action merit special reference. In principle, as long as they are adopted by the requirements of the *lex fori*, they are not grounds for denial of the *exequatur*. Furthermore, while any irregularity regarding the measure could impair the recognition of the measure—that is, if it was amenable to *exequatur* in the first place—it should not affect the final judgment, which is independent from the measure, if the latter meets the rest of the requirements. In fact, the measure is adopted on the basis of the main action and not the other way around. There are some *exequatur* decisions, however, that seem to be willing to entertain claims about the violation of due process rights in the adoption of provisional measures in the United States.[117] I think that this is a dangerous line of thought, which should not be pursued in the future.

G. Evidentiary Matters

Once one gets past the pleadings stage, each party is responsible for producing evidence to support its position. Here we may again stumble over delicate issues since the rules of evidence of common law systems are known to be more aggressive than those of civil law systems. Spain, for instance, has made a reservation to pre-trial discovery requests from common law countries under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970. Whether a Spanish court will cooperate with a common law court, regarding the taking of evidence in Spain, is an entirely different matter from whether it will recognize a U.S. judgment based on U.S. evidence law. In principle, *lex fori regit processum* and Spanish courts hold that the law applicable to the production, means and assessment of evidence of a U.S. judgment is U.S. law, although they have not totally relinquished their right to review it for violations of public policy or due process rights. Let us see some implications of their approach.

First, neither discovery, depositions without the supervision of the court nor jury trials in civil actions violate the due process rights of a defendant or Spanish public order, despite the fact that these institutions do not exist in Spain.[118]

Second, the right to use different means of evidence, which Spanish courts consider is a due process requirement, must be exercised according to the rules of the forum in which the litigation takes place.[119] In particular, while there is no right to unlimited evidence, a party's due process rights may be violated, if their right to use evidence was violated. Meeting this standard requires that the defendant show that relevant evidence was excluded from consideration without motivation, on absurd or arbitrary grounds, or on an unreasonable

116. *See, e.g.*, Fed. R. Civ. P. 15.

117. In STS, Nov. 13, 2001 (J.U.R. 2002 No. 608), the defendant claimed that its due process rights were violated by an American court's adoption of provisional measures. After determining that the defendant had an opportunity to be heard and a reasonable time to prepare its defense with respect to the disputed provisional measures, the Spanish Supreme Court found that the defendant's due process rights had not been violated.

118. *See, e.g.*, STS, Dec. 24, 1996 (R.J. No. 8394).

119. *See id.* (quoting several decisions by the Spanish Constitutional Court in this regard).

interpretation of the rules of evidence.[120] This standard is high enough that most U.S. courts would not be in fear of violating it.

Third, Spanish courts may control whether a foreign judgment is supported by evidence. In a 1989 decision based on a U.S. divorce case, the Spanish Constitutional Court said that the examination of whether a minimal evidentiary standard was satisfied did not require a review of the merits of a case and therefore did not go beyond the powers of Spanish courts in *exequatur* proceedings.[121] In this case, the U.S. court granted a divorce for cruel and unusual treatment at the husband's request. The case was exceptional because the U.S. court found that the wife had committed several injurious acts merely on the basis of the husband's depositions. This proved to be a much too lenient standard for the Spanish court.

While the foregoing decision may be criticized as a departure from the normal parameters of the *exequatur* mechanism, and while Spanish courts are generally not that intrusive, the decision nevertheless serves as important precedent for opponents in *exequatur* proceedings. For instance, some default judgments rendered by U.S. courts could turn out to be problematic under this doctrine. Under Spanish law, a default judgment merely entails that the party loses its opportunity to take any possible action available at the current stage of the proceedings, but the plaintiff must still make its case and the court may dismiss the complaint if it finds that there is insufficient evidence for the plaintiff. Under U.S. law, however, a default judgment can be rendered on the pleadings alone[122] and the same treatment may be given to failures to answer discovery motions.[123] Thus, a U.S. court may enter a default judgment without examining any evidence.

Paradoxically, while it would be easy to conclude that certain U.S. default judgments fail the requirement of a minimum degree of evidentiary activity set by the Spanish Constitutional Court, this conclusion is too hasty for a number of reasons. First, if the judgment is not based exclusively on a party's procedural behavior, the judgment may not fail the minimum evidentiary activity test. Second, the Spanish Supreme Court held recently that default judgments are not unknown under Spanish law, and therefore do not necessarily violate Spanish public policy or a party's right to due process.[124] In fact, given that default judgments for failure to appear are recognized in Spain, Spanish courts should accept foreign default judgments that are based on a failure to answer or respond to orders by the court, as the power of courts is narrower in the second case than in the first. In any case, to avoid problems during the *exequatur*, proponents of the *exequatur* should insist that the forum court hold evidentiary hearings despite the opposing party's failure to appear and participate in such hearings.[125] This is particularly important in light of the fourth implication.

Fourth, evidentiary findings by U.S. courts are not likely to be reviewed unless they are illogic or arbitrary. A particularly extreme example may be found in the Decision of the Spanish Supreme Court of December 24, 1996,[126] in which the defendant claimed that a U.S. judgment resulting from a jury trial violated Spanish public policy because certain jury

120. *Id.*

121. STC, Feb. 23, 1989 (R.T.C. No. 54).

122. *See, e.g.*, YEAZELL, *supra* note 34 at 567-568.

123. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(A), (C).

124. *See, e.g.*, STS, Nov. 13, 2001 (J.U.R. 2002 No. 608) (granting the *exequatur*); Francisco Ramos Méndez, *Ejecución en España de Una Sentencia Inglesa Dictada en Rebeldía Contra un Demandado Español*, JUSTICIA nums. 1-2, at 263 (2002); *see also* L.E.CIV. arts. 440, 441, 593, 661, 816 & 825.

125. *See, e.g.*, FED. R. CIV. P. 55(b)2.

126. STS, Dec. 24, 1996 (R.J. No. 8394).

members made statements acknowledging that their decision was made under external pressure, an issue that had been raised and dismissed in the U.S. proceedings. Moreover, the defendant also claimed that the damage award rendered was disproportionate and against Spanish public policy. Ultimately, however, the Spanish court refused to contradict the U.S. court's findings and therefore granted the *exequatur*—though the court noted that it was up to a Spanish court to assess the evidence and determine the amount of the award.

H. On the Merits

As already mentioned, the Spanish *exequatur* contains requirements that the foreign decision must meet. This does not include a review of the merits of the underlying case. However, given that the foreign judgment may be reviewed under the light of the Spanish *ordre public*, it is inevitable that some substantive issues may be of concern. In particular, two main questions arise: first, whether the law applied by a U.S. court matters; and second, whether there are causes of action under U.S. law that are not recognized in Spain. Since the analysis of these questions may lead to a complicated comparison of U.S. and Spanish substantive law, however, only the methodological approach of Spanish courts is addressed herein.

1. *Applicable law*

While defendants have opposed the *exequatur* by arguing that the foreign court failed to apply correct law and thus violated Spanish public policy, the majority of legal scholars assert that the law applied by the foreign court should not be reviewed on those grounds.[127]

While Spanish courts acknowledge that the applicable law is determined according to the rules on conflict of laws of the forum,[128] they have also suggested that they may control the law applied by foreign courts, particularly regarding the law applicable to the capacity of persons, their status, family matters and wills. This approach is pragmatic and teleological—to wit, Spanish courts allow the foreign decision to apply a different law if it leads to results that are substantially equivalent to those of the law perceived correct. Under this standard, the *exequatur* will not be denied if:

1) the results are equivalent under both laws;
2) the basic principles under Spanish law of the institution that the foreign judgment touches upon have not been violated; and
3) the judgment does not result in legal situations or consequences unknown to Spanish law or incompatible with the principles of the Spanish legal system.[129]

As one can see, this standard may lead Spanish courts to examine whether the cause of action or the institution under review is or is not in conflict with Spanish public policy. In light of this, it is more likely that a Spanish court will deny recognition because the cause of action is against public policy than because of choice of law issues.

2. *Causes of Action*

Spanish courts will not grant the *exequatur* if the judgment sought to be recognized is based on a foreign law that is inconsistent with Spanish public policy. In order to assess

127. Calvo Caravaca & Carrascosa González, *supra* note 10, at 374.

128. *See* STS, Jan. 20, 2004 (J.U.R. No. 54318).

129. *See, e.g.*, STS, Apr. 4, 2000 (R.J. No. 2966) (regarding the law applicable to the capacity of a person); *see also* STS, Feb. 22, 2000 (R.J. No. 771).

whether this is so in an *exequatur* proceeding, the First Instance Court may conduct a review of the underlying judgment's merits. For example, while this is no longer the case, the *exequatur* of a foreign divorce decree would not be granted when the divorce would not have been allowed in Spain. A more contemporary example may be found in revocable divorces, whose *exequatur* used to be denied because a divorce is irrevocable in Spain but may now be granted.[130]

The size of judgments in the United States may also implicate Spanish public policy.[131] The claim has been made, by legal scholarship and parties to *exequatur* proceedings, that inordinately large foreign judgments should not obtain the *exequatur.* Recent trends in the case law, however, seem to suggest otherwise. For example, as previously discussed, the judgment of the Spanish Supreme Court of November 13, 2001[132] granted the recognition of a U.S. judgment for, inter alia, punitive damages. In this case, the Spanish court took special care to note that punitive damages were awarded *ex lege*, that U.S. law contemplated punitive damages on the basis of the intentionality of the infringement of intellectual property rights, and that the underlying interests protected by U.S. law were not unknown to Spanish law. While this may be the approach that Spanish courts will follow in the future, punitive damages may still cause trouble in *exequatur* proceedings. Although, since it is possible to obtain a partial *exequatur*, a litigant may request that the *exequatur* reflect only the amount of damages that are proper under Spanish law.[133]

The liability of corporate directors has also been a matter of dispute on *ordre public* grounds. In a case discussed earlier, a U.S. court allowed a complaint by an insurance company that was suing a director and a corporation to recover damages paid to victims of a tort in the United States. The judgment was rendered by default and the Court declared that the director was jointly and severally liable, without any finding of liability or negligence in the exercise of his duties. The Spanish Supreme Court held that this violated Spanish public policy, stating there are several grounds on which a corporate director is liable but that liability merely on the condition of being a corporate director is not among them.[134]

I. The Final Judgment

The judgments of foreign (or U.S.) courts raise a number of issues in the context of the *exequatur.* First, as I understand the law, because motions for summary judgment are legally equivalent to full and final judgments on the merits of a cause of action, they would not be denied an *exequatur*[135] and it could therefore be enforced independently of the rest of the claims or causes of action.

130. The old practice is reflected in STS, July 23, 1996 (R.J. No. 2907). *But see* STS, Apr. 21, 1998 (R.J. No. 3563) (granting the *exequatur* of a revocable divorce on grounds of substantive justice).

131. This first is, of course, more an impression than true knowledge since one only hears about particularly scandalous cases in the newspapers.

132. STS, Nov. 13, 2001 (J.U.R. No. 608).

133. *See* Forner Delaygua, *supra* note 83, at 274-275; *See also* STS, Sept. 18, 2001 (J.U.R. No. 264071) (recognizing compensatory damages and an order to refrain from future infringement where the applicant excluded from its request a five million dollar award for punitive damages resulting from a trademark infringement case).

134. *See* STS, Jan. 20, 2004 (J.U.R. No. 54318).

135. Fed. R. Civ. P. 56.

Second, as a general rule, final judgments must be motivated in fact or in law to qualify for recognition in Spain. This is a due process requirement and is specifically included in the Spanish constitution.[136] While this is not generally an issue with U.S. judgments, as they are usually based upon evidentiary findings, some judgments could be denied the *exequatur* to the extent that they are not based upon evidence.[137] To avoid the latter scenario, as discussed, one should instruct the forum court to issue a decision that is based on the evidence presented. Note, however, that trial records are not a substitute for motivation[138], though a jury's findings and verdict may be.[139]

Third, Spanish law bars motivation or lack of motivation that results in an ineffective judicial protection.[140] Therefore, Spanish courts will not review the grounds of the judgment offered by the foreign court, except to the extent that it is unreasonable or illogical. Two examples illustrate this point. On the one hand, it would be convenient in damage awards if the U.S. court spelled out the different types of damages and their amounts instead of merely granting a lump-sum amount. This is the usual practice in Spain because it is deemed to be part of the motivation of the judgment to preserve the right of appeal of the interested party. On the other hand, a Spanish court held recently that even though a U.S. court failed to address a party's pleadings who had appeared initially but failed subsequently to retain counsel or appoint a new lawyer upon request by the court so that her action was dismissed by the court, this did not amount to an incongruence by the foreign judgment as long as the defendant had a possibility to request relief on the issue in front of the foreign court.[141]

Another problem may arise because of the authority of the person who enters a default judgment. There are two main types of default judgments:[142] First, when the plaintiff's claim is for a sum that is fixed or otherwise ascertainable by mere computation, the clerk of the court may enter judgment for that amount and costs; second, in all other cases, default judgments are entered by the court itself. Because the first type is not rendered by the Court and such a judgment is unknown in Spain, its enforceability may be questionable. However, in principle, to the extent that the clerk bases its decision on the evidence presented by the plaintiff and given that the clerk is a public official, the decision should be recognized. Thus, the mere fact that a final judgment is entered or authenticated by a court's clerk should not result in the denial of the *exequatur*.[143]

136. La Constitucion Espanola art. 120.3; *see also* STC, June 3, 1991 (R.T.C. No. 122); STC, Mar. 18, 1992 (R.T.C. No. 34).

137. For example, judgments by default, particularly when they constitute sanctions. *See* STS, Jan. 20, 2004 (J.T.S No. 54318). The defendant was an executive officer of a corporation which had been held liable together with the corporation and contended that the U.S. judgment did not specify the reasons for his liability. The Spanish court held that the judgment violated public order despite the fact that the applicants for the *exequatur* introduced as evidence the reports of the hearings in front of the American court to show what motivated the final decision of the Court.

138. *See id.*

139. STS, May 28, 2002 (J.U.R. No. 159003) (mentioning that it is aware of the fact that the judgment and the jury's verdict were contained in separate documents and that this would not amount to an unmotivated judgment that would not be amenable to *exequatur* for violation of the public order); *see also* STS, Sept. 18, 2001 (J.U.R. No. 264071).

140. *See* STS, Dec. 24, 1996 (R.J. No. 8394).

141. *See* STS, May 28, 2002 (J.U.R. No. 159003).

142. *See, e.g.*, Fed. R. Civ. P. 55(b).

143. *See id.* at 58.

The final judgment should also be served on a defendant even if he did not appear. Notification is required in this situation to preserve a defendant's right to appeal the judgment and the absence of notification will accordingly result in the denial of the *exequatur*.[144] Service should be affected even when the judgment is rendered by default and the defendant did not appear for mere inconvenience, which has been problematic for some U.S. judgments.[145] Note that Spanish courts treat this issue as a matter of public order.

Lastly, the judgment must be certified as final by the U.S. court to demonstrate that it is no longer subject to appeal.

III. Conclusion

Litigation under the shadow of a foreign *exequatur* is a risky business. If one is to enforce a common law judgment in a civil law jurisdiction, it may be necessary to take into account civil law from the very beginning. The standards of recognition, which are inherently open-ended—as they should be in a system that is applied to judgments coming from all parts of the world and to a variety of legal institutions—nevertheless cause a great deal of uncertainty. Moreover, different conceptions of legal institutions may lead to problems throughout the *exequatur*. Hopefully, this article has contributed to the reduction of this uncertainty by illustrating how Spanish courts have applied those standards and how they may be applied in the future.

144. *See* STS, Dec. 10, 2002 (R.J. No. 31) (denying the *exequatur* while waiver of service of a default judgment was valid by local procedures).

145. *See* STS, Jan. 20, 2004 (J.T.S. No. 54318); STS, May 28, 2002 (J.T.S. No. 159003) (holding that judgments must be served personally on defendants, not on counsel).